CASE NO. 82–980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT E. SADLAK,

Petitioner,

v.

ROBERT S. CELESTE ~~JAMES A. RHODES~~, Governor, State of Ohio, ANTHONY J. CELEBREZZE, JR., Secretary of State of Ohio; MAHONING COUNTY BOARD OF ELECTIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8240

VINCENT E. GILMARTIN
Prosecuting Attorney
Mahoning County Court House
Youngstown, Ohio 44503
(216) 747-2000

Attorneys for Respondents
James A. Rhodes,
Governor, State of Ohio
Anthony J. Celebrezze, Jr.,
Secretary of State of Ohio
Mahoning County Board of Elections.

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RESPONDENTS BRIEF IN OPPOSITION

Respondents James A. Rhodes, Governor of Ohio, Anthony J. Celebrezze, Jr., Secretary of State of Ohio and Mahoning County Board of Elections, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Sixth Circuit's judgment and opinion in this case.

STATEMENT OF FACTS

Petitioner instituted suit against the Governor, the Secretary of State and the Board of Elections of Mahoning County challenging the validity of Section 3513.257 of the Ohio Revised Code. The pertinent portion of that section is set forth inthe Petition. The section governs the number of signatures required of an independent candidate for office. Petitioner alleged that he wished to become an independent candidate for the office of United States Representative. He claimed that the statute discriminated against independent candidates by requiring them to obtain a greater number of signatures than was required of candidates for party nominations.

Petitioner had instituted two previous actions against the same defendants challenging the validity of that statute on the same grounds. Both actions had been dismissed for the failure of petitioner to prosecute.

Petitioner instituted the first action in the United States District Court for the Northern District of Ohio, Eastern Division on April 9, 1976, claiming that he wished to become an independent candidate for Congress from the Nineteenth Congressional District in the 1976 General Election.

The parties agreed that the case would be tried to the court upon a stipulation of facts and briefs. They also agreed upon the following briefing schedule: The brief of the plaintiff was to be filed twenty days after the filing of the stipulation of facts. The brief of the defendants was to be filed twenty days after receipt of the plaintiff's brief.

The stipulation of facts was filed April 22, 1977. Included in the stipulation was the fact that fifteen independent candidates for Congress qualified for the ballot in the general election of 1976.

As of May 7, 1979, over two years later, the petitioner had still not filed his brief. On that date, the court dismissed the action, without prejudice, for failure of prosecution.

On March 5, 1980, the petitioner instituted a second action in the same court against the same defendants attacking the validity of the same statute on the same grounds. On April 1, 1980, the defendants filed a motion to dismiss. The local rules require a response to such a motion within ten days.

Petitioner did not respond to the motion. On June 24, 1980, the court dismissed the action with prejudice, for failure to prosecute. The order of dismissal is set forth at Appendix A7 to the Petition.

On January 4, 1982, petitioner filed a third action in the same court against the same defendants attacking the same statute on the same grounds. The court dismissed the action on January 24, 1982. It stated that it is a fundamental principle in the law that a dismissal with prejudice serves as an adjudication on the merits which bars another suit by the same plaintiff against the same defendants on the same issues. The order of dismissal is set forth at Appendix A4 to the Petition.

On October 15, 1982, the judgment was affirmed by the Court of Appeals for the Sixth Circuit. The court agreed with the lower court that the action was barred by

the doctrine of res judicata. It also found that the underlying claim was without merit. The order is set forth at Appendix A1 to the Petition.

REASON WHY THE WRIT SHOULD BE DENIED

THE DECISION BELOW RAISES NO IMPORTANT QUESTION OF FEDERAL LAW

Petitioner is unable to present any important question of federal law for review. The court below merely applied the doctrine of res judicata. It is not disputed that the previous suit instituted by petitioner was dismissed with prejudice. Such a dismissal bars a subsequent action between the same parties on the same claim. 1 Restatement 2d, *Judgments* Section 19 Comment a; 9 Wright & Miller, 230 Section 2373.

Petitioner's reliance upon *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591 (1948) is misplaced. In that case this Court declined to give preclusive effect to the previous judgment because there had been a significant change in the controlling legal principles. *Id.* at 599. See also *Montana v. United States,* 440 U.S. 147, 161 (1979).

Petitioner can not show such a change in the applicable legal principles governing his claim. In fact those principles foreclose his claim.

The sole basis for petitioner's claim of discrimination is that independent candidates are required to obtain a greater number of signatures than party candidates. The

identical claim was raised and rejected in *Jackson v. Ogilvie,* 325 F.Supp. 864 (N.D. Ill. E.D., 1971), *aff'd,* 403 U.S. 925 (1971).

There are obvious differences between independent and party candidates. An independent candidate who obtains the required number of signatures is assured of a place on the ballot in the general election. A party candidate is not. If a party candidate obtains the required number of signatures it only assures him a place on the primary ballot. He must win the primary election to appear on the ballot in the general election. *Id.* 325 F.Supp. at 868; *Salera v. Tucker,* 399 F.Supp. 1258, 1266 (E.D. Pa., 1975), *aff'd.*, 424 U.S. 959 (1976).

Ohio has recognized these differences and has provided different routes to the ballot. This is permissible. "Sometimes the grossest discrimination can be in treating things that are different as though they were exactly alike". *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); *American Party of Texas v. White,* 415 U.S. 767, 981 n.13 (1974).

In addition this Court has held that a signature requirement for independent candidates for federal office is permissible so long as a reasonably diligent candidate could be expected to satisfy it. *Storer v. Brown,* 415 U.S. 724, 742 (1974); *Mandel v. Bradley,* 432 U.S. 173, 1977 (1977). The stipulation filed in the District Court shows that independent candidates for Congress in Ohio are readily able to satisfy that requirement.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General of Ohio

THOMAS V. MARTIN
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8240

VINCENT E. GILMARTIN
Prosecuting Attorney
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondents Brief in Opposition has been mailed via the United States first class mail service, postage prepaid, to Albert S. Rakas, 1573 Bonita Drive, Akron, Ohio 44313 and Kathleen S. Aynes, P.O. Box 143, Twinsburg, Ohio 44087, Attorneys for Petitioner, this _____ day of January, 1983.

THOMAS V. MARTIN
Assistant Attorney General